Supreme Court, U.S.
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No._____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

Deborah A. Sims,

Petitioner,

v.

Brown & Root Industrial Services, Inc. et al,

Respondent.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Where supervisors use the authority granted to them by employers to unilaterally alter the terms and conditions of employment in order to sexually harass supervised employees on a quid pro basis, do employer policies prohibiting sexual harassment coupled with remedial action, always insulate employers from Title VII liability as a matter of law?

2. Where summary judgment evidence shows that prior to being a plant superintendent and harassing plaintiff, the alleged harasser was a supervisor at another nearby project managed by the same employer. At that project, summary judgment evidence shows that it was well known at the plant by other lower level managerial employees that the harasser had attempted to obtain and did obtain sexual favors from female employees in exchange for employment benefits (i.e., committed acts of quid pro quo sexual harassment).

Is this evidence sufficient to create a genuine issue of material fact that the employer was on notice of sexual harassment by this same harasser and failed to take any action, giving rise to employer liability?

## LIST OF PARTIES TO THE PROCEEDINGS

A. Petitioner (Plaintiff-Appellee below) - *Deborah A. Sims*, a female, domiciled in Logansport, DeSoto Parish, Louisiana.

B. Respondent (Defendant-Appellant below) - *Brown & Root Industrial Services Corporation*, domiciled in Houston, Texas, with offices in various states.

C. *Frank Brossette* - this person was dismissed from the case.

## TABLE OF CONTENTS

Questions Presented for Review ..... i
List of Parties to the Proceedings in the Court Below . ii
Table of Authorities ..... iv
Opinions Below ..... vii
Statement of Jurisdictionv ..... iii
Constitutional Provisions, Treaties, Statutes, Rules, and Regulations Involved ..... 1
Statement of the Case ..... 2
Reasons for Granting Writ ..... 4
I. Where supervisors use the authority granted to them by employers to unilaterally alter the terms and conditions of employment in order to sexually harass supervised employees on a quid pro basis, do employer policies prohibiting sexual harassment coupled with its prompt remedial action, always insulate employers from Title VII liability as a matter of law? ..... 4
II. Summary judgment evidence proves genuine issue of material facts exists as to notice to employer of propensity to commit sexual harassment by agent 12
Conclusion ..... 13
Appendix:
A. Opinion of the U.S. Fifth Circuit Court of Appeals ..... 15
B. Opinion of the U.S. District Court, Western District of Louisiana, Shreveport Division ..... 21

## TABLE OF AUTHORITIES

### CASES


Page

United States Supreme Court:

*Albennarle Paper Co. v. Moody,*
422 U.S. 405, 417-19 (1975) ..... 11

*McKinnon v. Nashville Banner Publishing Co.,*
115 S.Ct. 879, 130 L.Ed. 2d 852 (1995) ..... 12

*Meritor Savings Bank, FSB v. Vinson,*
477 U.S. 57 (1986) ..... 4,7,8,9,11

Courts of Appeal:

*Baskerville v. Culligan International Co.,*
50 F3d 428, 431-32 (7th Cir. 1995) ..... 5,13

*Bouton v. BMW of North America,*
29 F3d 103, 100 (3d Cir. 1994) ..... 5,13

*Carmon v. Lubrizol,*
17 F3d 791, 795-96 (5th Cir. 1994) ..... 7

*Chamberlin v. 101 Realty, Inc.,*
915 F.2d 777, 785 (1st Cir. 1990) ..... 7

*Craig v. Y&Y Snacks, Inc.,*
721 F.2d 77, 80-81 (3rd Cir. 1983) ..... 11

*Flanagan v. A.I. Henry Com. Health Services Ctr.,*
876 F.2d 1231, 1235 (5th Cir. 1989) ..... 6

*Gary v. Long,*
59 F3d 1391, 1395 (D.C. Cir. 1995) ..... 6

*Gay v. Board of Trustees of San Jacinto College,*
608 F.2d 127 (5th Cir. 1979) ..... 6

## TABLE OF AUTHORITIES - cont.

*Grant v. Lone Star Co.*,
21 F.3d 649 (5th Cir. 1994), cert den
1155 S.Ct. 574, 130 Led2d 491 .....10
*Hamilton v. Rodgers*,
791 F.2d 439 (5th Cir. 1986) .....6
*Henson v. City of Dundee*,
682 F.2d 897, 905 (11th Cir. 1982) .....7
*Highlander v. K.F.C. Nat. Management Co.*,
805 F.2d 644, 648 (6th Cir. 1986) .....7
*Hirschfield v. New Mexico Dept. of Corrections*,
916 F2d 572, 579 (1Oth Cir. 1990) .....6,7
*Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*
755 F.2d 599, 604 (7th Cir. 1985) .....6,7
*Hunter v. Allis-Chalmers Corp.*,
797 F.2d 1417 (7th Cir. 1986) .....7
*Jones v. Flagship Int'l*, 793 F.2d 714,
721 (5th Cir. 1986), *cert den* 479
U.S. 1065, 107 S.Ct.952 (1987).....7
*Karibian v. Columbia University*,
14 F3d 773 (2d Cir. 1994),
cert. denied, 114 S. Ct. 2693 (1994) .....5,7
*Katz v. Dole*,
709 F.2d 251, 255 n. 6 (4th Cir. 1983).....7
*Kimbro v. Atlantic Ritchfield Co.*,
889 F.2d 869, 873-877 (9th Cir. 1989).....11
*Martin v. Cavalier Hotel Corp.*,
48 F3d 1343, 1350-53 (4th Cir. 1995).....5,9
*Nash v. Electrospace System, Inc.*,
9 F.3d 401, 404 (5th Cir. 1993) .....7
*Nichols v. Frank*,
42 F3d 503, 504-514 (9th Cir. 1994).....5

**TABLE OF AUTHORITIES** - cont.

*Pierce v. Commonwealth Life Ins. Co.*,
40 F.3d 796, 803 (6th Cir. 1994) .....6
*Sparks v. Pilot Freight Carriers*,
830 F2d 1554,
1557-1560 (11th Cir. 1987).....5
*Vance v. Southern Bell Tel. and Tel. Co.*,
863 F.2d 1503,
1511-1514 (11th Cir. 1989).....6
*Yates v. Avco*,
819 F.2d 630 (6th Cir. 1987) .....6

District and other courts:

NONE.

STATUTES:

42 U.S.C., Section 1254(1) .....2
42 U.S.C., Section 2000e (Title VII).....8

Other Authorities Cited:

Restatement (Second) of Agency
section 219(1) (1958) .....9
Equal Employment Opportunity Commission
guidelines on Discrimination because
of Sex, 29 C.F.R. Sec. 1604.11(a) (1986) .....7

## OPINIONS BELOW

The January 23, 1996, opinion of the U.S. Fifth Circuit Court of Appeals, whose judgment is herein sought to be reviewed, has been designated as an opinion not to be published under its Local Rule 47.5. However it is reprinted in the separate Appendix to this Petition, at page **15**. The opinion of the United States District Court for the Western District of Louisiana, entered on June 12, 1995, is reported at *Sims v. Brown & Root Indus. Services, Inc.*,889 F.Supp 920 (W. D. La. 1995). It is reprinted in the separate Appendix to this Petition at page **21**.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1996. The jurisdiction of this Court is invoked pursuant to 28 USC Section 1254(1).

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES and REGULATIONS INVOLVED

42 USC 2000e-2 Unlawful Employment Practices

(a) Employer Practices. It shall be an unlawful employment practice for an employer---

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals' race, color, religion, sex or national origin.

## STATEMENT OF THE CASE

Petitioner DEBORAH A. SIMS ("SIMS") was hired on August 10, 1992, by Frank Brossette ("BROSSETTE") project superintendent for Brown & Root Industrial Services, Inc., ("BROWN & ROOT") at the Olin Chemical Plant on Highway 1 (South) in Shreveport, Caddo Parish, Louisiana. Her starting wage as a warehouse clerk was $10.00 per hour. *BROWN & ROOT authorized Frank Brossette to exercise plenary power to hire and fire and otherwise unilaterally alter the terms and conditions of employment of DEBORAH A. SIMS.*

Commencing from the date she put in her application, until hired weeks later, and after she was hired by him, BROSSETTE systematically sexually harassed SIMS. He first asked if she needed a "sugar daddy". From her date of hire until he was fired, BROSSETTE verbally harassed her on a regular basis. His harassment consisted of various acts including requests that she go to a motel room with him; a call to her mother to ask about SIMS; comments about his sexual desire for her; a request to see her that he left with her apartment manager; calls to her apartment where he requested to come to see her. On most occasions he suggested a meeting or make a request for sex, SIMS refused all advances and on several occasions informed BROSSETTE that she was involved with another man or simply ignored him.

On or about January 17, 1993, BROSSETTE for no valid employment related reason, reduced SIMS' pay from $10.00 to $8.00 per hour and transferred her to another job. The reduction in pay was in retaliation for SIMS' refusal to engage in sexual relations with him.

A few days later, she dialed a 1-800 hotline answered at BROWN & ROOT's main offices in Houston, Texas, to report the sexual harassment. This was her first report to the Houston office. Within a matter of days BROWN & ROOT sent an investigator to the Olin Chemical site. The investigator interviewed witnesses and concluded BROSSETTE had indeed sexually harassed SIMS. The investigator provided BROWN & ROOT a report concluding SIMS had been sexually harassed and recommended the immediate termination of BROSSETTE. BROWN & ROOT fired BROSSETTE within a matter of days and restored SIMS's pay to $10.00 and reimbursed her the back wages she had lost.

On or about May 14, 1993, SIMS quit her job with BROWN & ROOT due to the stress caused by sexual harassment. There were still employees at the site who felt loyalty to Brossette. Due to the extreme pressure she experienced from BROSSETTE's insistent demands for sexual favors for nearly ten months, and being ostracized by some of the employees, she sought psychiatric treatment from doctors at the Sabine Valley Center in Carthage, Texas on June 8, 1993.

BROWN & ROOT had employed BROSSETTE for many years at various sites in various capacities. Immediately prior to the Olin Chemical project, BROWN & ROOT employed BROSSETTE at the UOP Plant project in Blanchard, Caddo Parish, Louisiana. He was employed as a mid-level supervisor. At this site, BROSSETTE used his position to offer job inducements to female employees in return for sex. The females never filed a formal complaint. However, one low level supervisor testified at deposition that BROSSETTE's activities as just described were well

known at the project. The same low level supervisor deposed that one female employee told him that she was forced to have sex with BROSSETTE to keep her job. Other supervisor knew BROSSETTE was actively pursuing female employees at this site. However, no investigation or disciplinary action was taken against BROSSETTE.

## REASONS FOR GRANTING THE WRIT

*I. Employer liability for acts of Agent*

Where supervisors use the authority granted to them by employers to unilaterally alter the terms and conditions of employment in order to sexually harass supervised employees on a quid pro basis, do employer policies prohibiting sexual harassment coupled with its prompt remedial action, always insulate employers from Title VII liability as a matter of law?

MAY IT PLEASE THE COURT,

This Court should grant the writ in order to resolve a split between the federal circuit courts of appeals on the important question of employer liability for quid pro quo sexual harassment against employees by supervisors who possess the unilateral power to alter the terms and conditions of employment. The Fifth Circuit virtually stands alone on this issue. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986),

this Court "decline[d] the parties' invitation to issue a definitive rule on employer liability" for workplace sexual harassment, instead directing the lower courts "to look to agency principles or guidance in this area." 477 U.S. at 72. Ten years later, this experiment with malleable "agency principles" as the sole guidepost for deciding employer liability for sexual harassment under Title VII has left the law in a state of disarray and created a serious and growing conflict among the federal circuit courts of appeals.

Without a "definitive rule," or at least more specific guidance, the lower courts have used a hodgepodge of conflicting agency principles and theories to reach ad hoc and often contradictory conclusions as to whether employers should be held liable for acts of sexual harassment committed by supervisory personnel.[1] See, e.g., *Karibian v. Columbia University*, 14 F3d 773 (2d Cir. 1994), cert. denied, 114 S. Ct. 2693 (1994) (employer liable for supervisor's acts despite employer anti-harassment policy);[2] *Bouton v.*

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[1] By providing an expanded range of remedies for victims of sexual harassment and other forms of discrimination; including compensatory and punitive damages, the Civil Rights Act of 1991 has raised the potential economic impact which has heightened the need for uniform standards in this area.

[2] The Fifth Circuit did not attempt to differentiate *Karibian* or any of the many other federal circuit cases cited in appellant's brief. This irreconcilable split between the Second Circuit and the Fifth Circuit alone provides sufficient grounds fro review by this Court.

*BMW of North America*, 29 F3d 103, 100 (3d Cir. 1994) (employer not liable; but decision "to alleviate liability" based on employer's anti-sexual harassment policy "is a policy decision based on the appropriate amount of deterrence"); *Sparks v. Pilot Freight Carriers*, 830 F2d 1554, 1560 (11th Cir. 1987) (employer liable where supervisor was "aided by" employer authority in harassing); *Baskerville v. Culligan International Co.*, 50 F3d 428, 431-32 (7th Cir. 1995) (employer not liable, but noting that it is an open question whether an employer is strictly liable "where a supervisor threatens to fire a subordinate if she refuses to have sex with him"); *Martin v. Cavalier Hotel Corp.*, 48 F3d 1343, 1351-53 (4th Cir. 1995) (employer liable because harasser's acts were within the scope of employment and harasser was aided by authority from employer, despite existence of employer anti-harassment policy); *Nichols v. Frank*, 42 F3d 503 (9th Cir. 1994) (employer liable where supervisor used employer's authority to make quid pro quo threats to employee); *Hirschfield v. New Mexico Dept. of Corrections*, 916 F2d 572, 579 (1Oth Cir. 1990) (employer not liable where harasser "never invoked [employer's] authority to facilitate his harassment of plaintiff"). *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.* 755 F.2d 599, 604 (7th Cir. 1985) (if harasser is the agent then whether his superiors know or should have known what he did is irrelevant.); *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1511-1514 (11th Cir. 1989) (for sexual harassment purposes, a supervisor is an agent if the case is a "quid pro quo" one); *Gary v. Long*, F3d (D.C. Cir. 1995) (Employer not liable in quid pro quo case where supervisor never followed through on threats of adverse employment

action.)[3] *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994) ("In supervisor sexual harassment cases, an individual who is acting as an employer's 'agent' is deemed the alter ego of the employer and the employer is liable . . . .").

On another level, the Fifth Circuit[4] as well as other Circuits have established that in Title VII cases where an employer has control over a supervisor/agent, the discriminatory acts of the supervisor/agent are imputed to the principal/employer, thereby creating liability on the principal/employer. For example, see *Horn supra.*; *Vance supra.*

However, in this case, the Fifth Circuit clearly places an additional requirement on the plaintiff to prove that what harassment the agent was doing was known to the employer and the employer failed to take prompt remedial action.

The majority rule as of this writing seems to be that if the employer has vested the employee with the

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[3] Although this case was decided for the employer, the D.C. Circuit at recognized that when a supervisory employee does in fact use his powers to take adverse employment action against a harassment victim, then the employer is *strictly* liable. This is what the Fifth Circuit refuses to do. The line must be drawn to protect both the employer and the victim.

[4] See *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986) (en banc) at 444. *Gay v. Board of Trustees of San Jacinto College*, 608 F.2d 127 (5th Cir. 1979); *Flanagan v. A.I. Henry Com. Health Services Ctr.*, 876 F.2d 1231, 1235 (5th Cir. 1989).

power to hire or fire and the supervisory employee exercises this power within the course and scope of his employment, then the employer is liable, regardless of any proactive steps taken and regardless of notice.

The Fifth Circuit in this case has built a barrier to obtain relief under Title VII in that the plaintiff must prove the employer knew or should have known of the harassment and the employer failed to take prompt remedial action. *Jones v. Flagship Int'l*, 793 F.2d 714, 721 (5th Cir. 1986), *cert den* 479 U.S. 1065, 107 S.Ct.952 (1987); *Nash v. Electrospace System, Inc.*, 9 F.3d 401, 404 (5th Cir. 1993); *Carmon v. Lubrizol*, 17 F3rd 791, 795-96 (5th Cir. 1994).

There are several circuits which hold contrary to the Fifth Circuit on this issue. See *Horn, supra.; Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); *Karibian supra; Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982); *Hirschfield supra; Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 785 (1st Cir. 1990); *Highlander v. K.F.C. Nat. Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *Katz v. Dole*, 709 F.2d 251, 255 n. 6 (4th Cir. 1983). See also EEOC Compliance Manual (CCH) Section 3114 at p. 3282 (Policy Guidance on Sexual Harassment); Equal Employment Opportunity Commission guidelines on Discrimination Because of Sex, 29 C.F.R. Sec 1604.11(a) (1986).

Even this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) supports the finding that the American general rule is employer liability for acts of supervisory employees, in referring to EEOC arguments: "Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should

have known, or approved of the supervisor's actions." 91 L.Ed.2d at 62; 477 U.S. at 70.

In *Vinson, supra*, this Court declined to set forth any definitive ruling on the liability of an employer for the acts of its employees. It did, however, reject "absolute liability on employers for the acts of their supervisors, *regardless of the circumstances of a particular case*." (Emphasis Supplied). The Court did thus intimate that absolute liability will attach under certain circumstances. In a strong concurrence in *Vinson*, four Justices which after relying on circuit cases and National Relations Labor Act cases, stated:
Following that approach, every Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee.

**However, the Fifth Circuit has done just the opposite: it has rejected absolute liability regardless of the circumstances.** Petitioner reads the *Vinson* case only as an attempt to reject the principle of strict liability of an employer for the acts of a supervisor who has no power to hire or fire or to do the act which resulted in the discrimination at issue. What does seem to be the rule is that when the employer gives the employee the power to do a particular act and the employee exercises the power in a discriminatory manner which violates Title VII, then the employer is liable. The latter is the case here.

The Fifth Circuit Court of Appeals apparently reads *Vinson* to make the principles of agency fully and exclusively applicable. However, this Court stated: "We therefore decline the parties' invitation to issue a

definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for *guidance* in this area." (Emphasis Supplied). And, the Fifth Circuit has apparently decided that Restatement (Second) of Agency, Section 219(1) does not impute liability of an agent to the principal.[5] The Court of Appeals ignores the intent of Congress to apply Title VII to a wide range of acts. Title VII is to be liberally construed in favor of finding coverage. To hold that the employer is not liable for the sexual harassing acts of its supervisors with the power to hire and fire, is to read out of Title VII the statutory language that the discriminatory act of an employer's agents creates liability.

The decision by the United States Court of Appeals for the Fifth Circuit in this case displays the danger that continued uncertainty on the scope of employer liability will eviscerate Title VII's protection against sexual harassment and possibly in the field of race or national origin harassment on the job. The Fifth Circuit has strayed from this Court's holding in *Vinson* and precedent in other federal circuit courts of appeals by issuing a ruling in this case that insulates employers from Title VII liability for workplace sexual harassment in a broad range of cases. In essence, the court has created a "safe harbor" for employers -exempting them from liability as a matter of law -- so long as they have no actual or constructive knowledge

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[5] Martin v. Cavalier Hotel Corp., supra provides an excellent discussion of why Section 219(1) acts to attach absolute liability to an employer for the acts of an agent (i.e., supervisor with the unfettered power to unilaterally alter terms and conditions of employment.)

of sexual harassment, have implemented a reasonable anti-sexual harassment policy, and have taken prompt remedial action, regardless of the harasser's use of employer-delegated authority.

This result is unsupported by any agency law principle and is thus contrary to *Vinson* and many decisions by other federal circuit courts of appeals. It precludes victims of sexual harassment in the Fifth Circuit from pursuing claims available to similarly situated victims in other circuits,[6] and it violates the maxim that Title VII should be liberally interpreted to

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[6] The bounds of the court's "safe harbor" provision are potentially enormous. Its requirements will be satisfied in numerous cases because many employers now have anti-sexual harassment policies; employers frequently have no knowledge of sexual harassment, as it usually occurs behind closed doors; and there is no need for the harasser to take adverse employment action when quid pro quo harassment has been effective, because the victim submits to the harasser's demands or at least tolerates them.

Moreover, the implications are equally enormous in other Title VII causes of action including age, race, national origin and religious harassment. These legal protections are vital for a free society and must be accorded the highest priority. A society bound financially to pay homage to employers who intentionally discriminate on these bases loses its soul and most treasured freedoms.

[7] In light of now near-unanimous holdings by the circuit courts of appeals that individual supervisors are not liable for damages for sexual harassment in their personal capacity under Title VII, including the Fifth Circuit. See *Grant v. Lone*

provide relief to all victims of workplace discrimination. *Albennarle Paper Co. v. Moody*, 422 U.S. 405, 417-19 (1975). This result cannot and ought not stand.

The judgment of the United States Court of Appeals for the Fifth Circuit Court of Appeals should be reviewed by this Court because it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision: First, the appellate court's decision is contrary to the majority of decisions regarding liability of an employer for sexual harassment by a supervisor without regard to notice. Second, the decision is contrary to the purposes of Title VII. Third, the Fifth Circuit's opinion does not follow the precedent set by this Court in *Vinson, supra.*

Petitioner contends that she need not show that the employer knew or should have known of the harassment if the harasser was a supervisor with the plenary power to control the terms and conditions of employment (i.e., power to hire, fire, grant raises and demotions). The employer can reasonably and foreseeable expect that such an agent could abuse the wide ranging powers granted to the agent. The Fifth Circuit concentrated on the prompt remedial action. Petitioner focuses on the issue of notice.

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*Star Co., 21* F3d *649* (5th Cir. 1994), cert den 1155 SCt 574, 130 LEd2d 491. Victims of sexual harassment will have no remedy unless their employers can be held liable when their supervisors use employer-delegated authority to sexually harass them.

Notice is the linchpin. Since under these circumstances notice is automatically imputed to the employer, there can be no prompt remedial action. Accordingly, should a victim not complain under these circumstances, the company should still be attributed with notice. And, with notice at the first instance of sexual harassment without any remedial action, the employer is liable regardless. Compare *Craig v. Y&Y Snacks, Inc.*, 721 F.2d 77, 80-81 (3rd Cir. 1983); *Kimbro v. Atlantic Ritchfield Co.*, 889 F.2d 869, 873-877 (9th Cir. 1989).

It is not as the Fifth Circuit stated, of little societal gain to punish the employer who takes all reasonable and necessary steps to deal with the harassment once "it" receives actual notice. ("Holding a company liable after it has taken prompt remedial action would 'produce truly perverse incentives benefiting no one, least of all actual or potential victims of sexual harassment.'") The Fifth Circuit leaves us to guess the "truly perverse incentives" two which it alludes.

This Court has taken steps in other cases to limit exposure rather than insulate the employer entirely. "The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her."[8] The same reasoning applies to Title VII. See *McKinnon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 130 L.Ed. 2d 852 (1995). Thus in this instance, the employer will still be vigorous to protect rights if its agent harasses

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[8] This Court can easily assume that quid pro quo harassment occurred. Summary judgment evidence on this point is overwhelming.

because such policies and procedures as exercised by BROWN & ROOT still protect it against nonagent harassment and against the imposition of punitive damages. To hold otherwise will leave a person such as SIMS with no compensation for a lost job and being saddled with a long standing serious mental condition. Moreover, BROWN & ROOT would have no incentive to educate and train supervisors more strenuously --- although supervisors are in leadership positions --- than the person charged with performing menial labor tasks. To treat every person regardless of his or her position and duties on the same level ignores business realities.

*II. Summary Judgment Evidence*

Summary judgment evidence shows a genuine issue of material fact exists as to notice to employer of propensity to commit sexual harassment by agent.

The Fifth Circuit did not correctly consider the acts of Brossette at the Blanchard, Caddo Parish, Louisiana, work site. There was plenty of summary judgment evidence to establish a genuine, material issue of fact regarding whether the employer had constructive notice of the harassing nature of the supervisor. Several of the lower level foremen knew or should have known that Brossette was offering young female employees job inducements for sex; one foreman in particular spoke directly with one of the victims. The trial court described this evidence as only a rumor. The same low level foreman described the reputation of Brossette for pursuing female employees

with job inducements as well known to all personnel at the Blanchard site.

At least one court has described the plaintiff's burden to prove liability on the employer in terms of negligence. *Baskerville, supra.* and *Bouton, supra.* Plaintiff here has proven that there is sufficient evidence to hold the employer liable for being "negligent" in retaining Brossette given his open manner of pursuing young female employees or for continuing to place him in supervisory positions where he could continue his illegal pursuits. BROWN & ROOT should have known of BROSSETTE's prior acts of sexual harassment and it failed to take any action whatsoever.

## CONCLUSION

In conclusion, your Petitioner respectfully contends that the U.S. Fifth Circuit Court of Appeals erred by not reversing the lower court.

Without an application of the agency relationship, it would be difficult for victims of discrimination to assess liability against the corporate employer or others who are able to afford the victim compensation. Without compensation or a remedy, the effect of Congressional will is rendered null.

The frequency with which employer liability based upon an agent's conduct arises in Title VII litigation and the current lack of clarity as to the analysis to be applied, are of such wide ranging social importance nationwide as to command a definitive pronouncement by this Court.

Petitioner respectfully requests that this Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A: OPINION BELOW
OPINION OF
U.S. FIFTH CIRCUIT COURT OF APPEALS

U. S. COURT OF APPEALS
FILED
JAN 23 1996
CHARLES R. FULBRUGE III
CLERK

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No. 95-30440
(Summary Calendar)

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DEBORAH A. SIMS,

Plaintiff-Appellant,

versus

BROWN & ROOT
INDUSTRIAL SERVICES INC.,

Defendant-Appellee,

and

FRANK BROSSETTE

Defendant.

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Appeal from United States District Court
for the Western District of Louisiana
(94-CV-708)

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Before JOLLY, JONES, AND STEWART,
Circuit Judges.

PER CURIAM:

Deborah Sims was sexually harassed by the project superintendent at her job with Brown and Root Industrial Services ("Brown & Root"). When she reported the harassment according to the policy in place at Brown & Root, the claim was immediately investigated, the project superintendent was fired, and Sims's pay was reimbursed. Nevertheless, she brought suit against Brown & Root, alleging that she should not have had to prove a failure to take prompt remedial action, and that Brown & Root had constructive knowledge that the project superintendent involved pervasively sexually harassed women. The district court granted summary judgment for Brown & Root, and Sims appeals that decision. We AFFIRM.

## FACTS and BACKGROUND

Sims claims that project superintendent Frank Brossette made unwelcome sexual advances even before she was hired. Within a short time after her hiring, she was made aware of the policy at Brown & Root that provided a "hot line" to Human Resources for complaints of sexual harassment. Although Brossette's continued behavior was inappropriate and unwelcome -- he propositioned her, called her mother and asked personal questions, and "banged" on her apartment door at odd hours of the night -- she did not

complain until he docked her pay by $2.00 per hour for refusing to have intimate relations with him. When she complained shortly thereafter, her complaint was immediately investigated, Brossette was dismissed, and Sims's back pay was fully reimbursed. Sims brought a sexual harassment claim under federal and state law against Brown & Root, state tort law claims against Brossette, and filed a third party demand against State Farm, Brown & Root's insurer. All of the claims were dismissed on summary judgment. Sims appeals only the dismissal of Brown & Root. She claims that she should not have been required to show that Brown & Root failed to take prompt remedial action. She also contends that the district court erred in finding that Brown & Root did not have constructive knowledge that Brossette sexually harassed women.

## DISCUSSION

A grant of summary judgment is reviewed de novo under the same standard as that applied by the district court. Ellert v. University of Texas, at Dallas, 52 F.3d 543, 545 (5th Cir. 1995). Summary judgment is proper "if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 273 (1986). Where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, then summary judgment should be granted. Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993). With

these principles in mind, we now turn first to the legal issue concerning sexual harassment law, and then to the mixed law-and-fact issue dealing with constructive knowledge.

Sims argues that she should not be required to show that Brown & Root failed to take prompt remedial action once they received actual or constructive notice of the sexual harassment. She argues that, regardless of the fact that Brown & Root took prompt remedial action, they should be held liable for Brossette's wrongful behavior on the grounds that he was a supervisor, rather than a co-worker and he controlled Sims' terms and conditions of employment. As pointed out by the district court in its memorandum opinion, the necessary implication of her argument is that Brown & Root should be held strictly liable for the wrongful behavior of it employee Brossette.

In Nash v. Electrospace System, Inc., 9 F.3d 401, 404 (5th Cir. 1993), this court explicitly rejected strict liability for employers in sexually hostile work environment claims brought under Title VII, stating that "[a]n employer is liable only if it knew or should have known of the employee's offensive conduct and did not take steps to repudiate that conduct and eliminate the hostile environment." The same denial of strict liability holds true in a quid pro quo sexual harassment claim because the elements of both claims are nearly identical.

The distinctions between claims of a sexually hostile environment and quid pro quo sexual harassment are outlined by this court in Jones v. Flagship International, 793 F.2d 714, 719-22 (5th Cir. 1986), cert. denied 479 U.S. 1065, 107 S. Ct. 952, 93 L.

Ed. 2d 1001 (1987). The only difference between the two claims is that in a quid pro quo situation, the harassment complained of must affect tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. Jones, 793 F.2d at 722. In a sexually hostile environment, the harassment complained of must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Jones, 793 F.2d at 719-20. Otherwise the elements of both claims are the same: 1) The employee belongs to a protected group, 2) The employee was subject to unwelcome sexual harassment, 3) The harassment complained of was based upon sex, 4) The employer knew or should have known of the harassment in question (respondeat superior) and failed to take prompt remedial action. Jones, 793 F.2d at 719-22. Thus, while Nash addressed only a sexually hostile environment claim, Jones indicates that the plaintiff is required in both situations to prove a failure to take remedial action, and thus the Nash holding rejecting strict liability is equally applicable to a quid pro quo claim.

Moreover, common sense, as discussed both in the memorandum opinion and the amicus curiae brief, dictate that strict liability should not apply to a sexual harassment claim and a plaintiff should be required to prove that the employer failed to take prompt remedial action. If the employer were to be held strictly liable even after having taken prompt remedial action, then he would have no incentive to take such remedial action, and no incentive to create effective policies in order to prevent such abuses. Holding a company liable after it has taken prompt remedial action would "produce truly perverse incentives benefiting no one,

least of all actual or potential victims of sexual harassment." Carmon v. Lubrizol, 17 F.3d 791, 795-96 (5th Cir., 1994). Because Sims could not show that Brown & Root failed to take prompt remedial action, the district court made no error in holding that Sims's claims against Brown & Root failed.

Sims also claimed that Brossette's prior acts tend to prove that Brown & Root knew or should have known of Brossette's behavior at a much earlier date and failed to take prompt remedial action at that point. In Waltman v. International Paper Co., 875 F.2d 468, 478 (5th Cir. 1989), a case dealing in part with a supervisor's sexual harassment of an employee, this court found that the plaintiff had shown actual knowledge on the part of an employer sufficient to withstand summary judgment review because she proved that she had complained to higher management. Moreover, this court also found that she had adduced sufficient summary judgment evidence to raise a fact issue with regard to constructive knowledge: constructive knowledge was inferred where there was sexual graffiti directed at the plaintiff in numerous locations at her place of employment.

In the case at bar, despite her awareness of the policy prohibiting sexual harassment at Brown & Root, Sims did not pursue the procedure outlined by that policy until Brossette docked her pay, consequently, there was no actual knowledge on the part of Brown & Root of any harassment prior to that time. With regard to constructive knowledge, Sims presented the depositions of other employees who had said that they either were themselves propositioned by Brossette or knew of others who had been. Upon reviewing this summary judgment evidence, the district court found

that the only supervisors who had heard "rumors" of Brossette's conduct were low-level foremen, and there was a notable absence of evidence that a higher level supervisor or immediate supervisor had knowledge of Brossette's alleged conduct. On this basis, the court found "as a matter of law" that Brown & Root had not had constructive knowledge that Brossette sexually harassed female employees, and then concluded that Sims failed to raise a genuine issue of material fact whether Brown & Root had knowledge of Brossette's prior conduct and failed to take prompt remedial action at that point. After a thorough review of the record, we agree, and therefore AFFIRM the granting of summary judgment to appellee Brown & Root.

APPENDIX B: OTHER OPINIONS

[FILED JUNE 12 1995]

OPINION OF
U.S. DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA

**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF LOUISIANA**
**SHREVEPORT DIVISION**

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DEBORAH A. SIMS

versus

CIVIL ACTION NO. 94-0708

JUDGE TOM STAGG

BROWN & ROOT INDUSTRIAL SERVICES, INC., ET AL

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**MEMORANDUM RULING**

Deborah Sims ("Sims") has brought a sexual harassment claim under federal and state law against Brown & Root Industrial Services, Inc. ("Brown & Root") and state tort law claims against Frank Brossette ("Brossette"), a former employee of Brown & Root. Brossette has, in turn, filed a third party demand against State Farm Fire & Casualty Company ("State Farm"), seeking coverage for the claims asserted by

Sims. Brown & Root, Brossette, and State Farm each filed a motion for summary judgment. For the reasons set forth below, these motions are **GRANTED** and Sims' claims are **DISMISSED WITH PREJUDICE.**

## I.BACKGROUND[1]

### A. Facts

Brossette was a Project Manager for Brown & Root at the Olin Chemical Plant jobsite in Shreveport, Louisiana, when he interviewed Sims for a job assisting the purchasing agent in pur-chasing and receiving parts. After the interview, Brossette telephoned Sims at least two times per week for three con-secutive weeks. The content of these telephone conversations apparently consisted of Brossette pursuing Sims romantically; he also invited her to have sex with him in exchange for em-ployment. Brossette's comments to Sims on the date of her interview or via telephone include:

(1) that she needed either a "TV daddy" or a "sugar daddy"; and

(2) asking whether she "loved as good as she looked."

Although Sims declined his advances, she was offered a job with Brown & Root. She accepted the position and began work on September 17, 1992. When

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[1] For the purposes of this Memorandum Ruling only, the court will assume that Sims' deposition testimony relating to her Title VII claim is true.

Sims arrived at work she was shown Brown & Root's policy prohibiting sexual harassment.[2] She did not, however, at that time, complain about Brossette's pre-employment behavior.

Sims was an assistant to Judy Ladner and spent almost no time directly with Brossette. She came into contact with him only when Ladner sent her to get Brossette's lunch order or to get some information from Brossette. Nevertheless, Brossette apparently managed to make unwelcome advances during these brief interludes. The following are some of the alleged acts Brossette made toward Sims once her employment began:

(1) Brossette asked on numerous occasions if he could come to her apartment;

(2) Brossette instructed some employees not to speak to Sims;

(3) Brossette patted Sims on the buttocks;

(4) when Sims asked Brossette what he wanted for lunch, he replied, "you." Sometimes he would mouth, "your body";

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[2] Sims admits that on her first day of employment, Tracy Hood, the office manager, told Sims that Brown & Root had a policy prohibiting sexual harassment; Hood also showed Sims the policy. Additionally, Sims knew that the policy was posted on a bulletin board outside of the trailer office in which she worked.

(5) Brossette asked Sims if she wanted to borrow money from him--if she would "pay him back";

(6) Brossette called Sims' mother to ask her mother about "very personal matters" regarding Sims;

(7) Brossette stopped by Sims' apartment and talked to Stacy Adams, Sims' apartment manager, and left his business card;

(8) Brossette told Sims on at least two occasions that he found her attractive by commenting that she looked good in her pants;

(9) Brossette instructed Sims to go to a motel; and

(10) Brossette reduced Sims' pay from $10.00 to $8.00 per hour for her failure to submit to his request for sexual favors.

Sims continued to work at her reduced rate of pay for approximately one month. Then, in the last week of February, Sims complained of Brossette's conduct, utilizing Brown & Root's sexual harassment policy. This policy provides, in pertinent part:

> If you believe you are being discriminated against you should implement the Open Door Complaint Policy by first discussing the matter with your immediate supervisor. If you are not satisfied with the response from using the chain of command, you should address your concern with the Project EEO Officer. If the problem is not resolved at that level, you should advise your Business Unit Personnel Manager and/or the Employee Relations/ Compliance Department in Houston [the telephone number was inserted here]. Although we encourage you to resolve complaints using the chain of command, the Open Door Policy allows you to address problems to any level of supervision.

Deposition of Deborah Sims, at Exhibit 4 (December 20, 1994) (attached to Brown & Root Memo. Supp. Summ. J.).

Sims made her complaint to a supervisor, Tracy Hood, who immediately placed a call to Greg Conklin at the Human Resources Department at the company's main offices in Houston, Texas. The same day, Conklin called Sims at her home and listened to her complaints. He told her that Brown & Root would investigate her claims, pay back any lost money if necessary, and that she should let him know immediately if anything else happened. True to his word, the following week, the first week of March, a representative from the Human Resources Department, Ralph Morales, went to the

jobsite to investigate Sims' claim. Morales interviewed several Brown & Root employees, including Sims and Brossette. As a result of Morales' investigation, Brown & Root concluded that "[t]here is an abundance of testimony regarding the conduct of ... Brossette which makes a very strong case for quid pro quo type sexual harassment. Although Frank denies it, there are just too many people saying the same things about him." Brossette was terminated on March 10. 1993, the second week of March, for violation of Brown and Root's sexual harassment policy.

Additionally, Sims was reinstated to her previous wage scale and paid her unpaid past wages. After Brossette's termination, however, Sims claims that she began to feel "awkward" because of the behavior of two of Brossette's relatives who were still working at the jobsite. Without making any further complaints to Brown & Root, she resigned on May 19, 1993.

**B. Sims' Legal Claims**

Sims claims that Brown & Root is liable for sexual harassment pursuant to Title VII and Ls. R.S. § 51:2231. She claims that a hostile work environment existed at Brown & Root; and that Brossette's pre-employment conduct offering employment for sex and his decision to reduce her pay once it became clear to him that she would not have sex with him was quid pro quo sexual harassment.

Sims also claims that Brossette is liable for the state law torts of battery and intentional infliction of emotional distress. The battery allegedly occurred when Brossette patted Sims on the buttocks and when

he "hugged" her neck. The intentional infliction of emotional distress tort allegedly occurred when Brossette called Sims' mother to ask personal questions about Sims' sex life; when Brossette propositioned Sims; when Brossette reduced Sims' wages because she would not engage in sex with him; when Brossette called Sims' apartment manager to meet with Sims; and when Brossette appeared at Sims' apartment at approximately 3:00 A.M. to 4:00 A.M. on two separate occasions. Sims claims that Brown & Root is liable for both of these torts under the theory of respondeat superior.

Finally, Sims claims that she was constructively discharged from her job. She argues that Brossette's behavior and the "attitude" of two other Brown & Root employees, who are also Brossette's relatives, caused her to resign from her position.

## II. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56 (c), a summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The court must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

The party seeking summary judgment has the initial responsibility of informing the court of the basis for its motion, and identifying those parts of the record

that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). The moving party need not produce evidence negating the existence of a material fact, but need only point out the absence of evidence supporting the nonmoving party's case. Id. at 325, 106 S.Ct. at 2554; Fontenot v. Upjohn Co., 780 F.2d 1190, 1195 (5th Cir. 1986). If the moving party carries his initial burden, the burden then falls upon the nonmoving party to demonstrate the existence of a genuine issue of a material fact. This showing requires more than "some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1355-56 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Id.; see Boeing Company v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). While the party opposing the motion may use proof filed by the movant to satisfy his burden, "only evidence--not argument, not facts in the complaint--will satisfy" the burden. Solo Serve Corp. v. Westowne Assoc., 929 F.2d 160, 164 (5th Cir. 1991). "Unsworn pleadings, memoranda or the like are not, of course, competent summary judgment evidence." Larry v. White, 929 F.2d 206, 211 n.12 (5th Cir. 1991), cert. denied, ___ U.S. ___, 113 S.Ct. 1946 (1993).

Where the moving party bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. International Short Stop, Inc. v. Rally's, Inc., 939 F.2d 1257 (5th Cir. 1991), cert. denied, 502 U.S. 1059, 112 S.Ct. 936 (1992). The nonmovant may defeat the motion by showing a

genuine dispute of material fact or by showing that the moving party's evidence is so transparent that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party. Id. "Summary judgment is appropriate where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, or where it is so overwhelming that it mandates judgment in favor of the movant." Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993).

## III. ANALYSIS

### A. Title VII[3]

#### 1. Legal standard

Whether making out a claim for hostile work environment or quid pro quo type sexual harassment, a plaintiff must prove that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. Jones v. Flagship Int'l, 793 F.2d 714, 419-422 (5th Cir. 1986), cert. denied, 479 U.S. 1065, 107 S.Ct. 952 (1987). Failure to raise a genuine issue of material fact as to this element will result in dismissal of a plaintiff's claim on summary judgment. Nash v. Electrospace System, Inc., 9 F.3d 401 (5th Cir. 1993). Because failure to take prompt remedial action is crucial to Sims' success, the absence of a genuine issue of fact on that subject will be decisive.

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[3] Sims also claims that Brown & Root violated Louisiana's sexual harassment law. La.R.S. 51:2231. This statutory scheme is a "mirror image" of Title VII. See Fisher v. Farley, 1994 WL90325 (E. D. La. 1994); see also Bennett v. Coroon & Black Corp., 517 So.2d 1245 (La. App. 4th Cir. 1987), writ denied, 520 So.2d 425 (La. 1988). Thus, in addressing Sims' Title VII claim, this court is also deciding Sims' state law sexual harassment allegation.

## 2. Prompt remedial action

### a. Brown & Root's arguments

Brown & Root asserts that it had no knowledge of Brossette's behavior until Sims actually complained. Further,
upon learning of Brossette's actions toward Sims, it took prompt remedial action to correct the problem. Thus, it argues that precedent and policy dictate that its corrective actions negate liability under Title VII. Citing Carmon v. Lubrizol Corp., 17 F.3d 791, 795 (5th Cir. 1994) ("overwhelming evidence of the prompt and proper responses by Lubrizol" negated employer's liability under Title VII); Nash, 9 F.3d at 404 (5th Cir. 1993) (employer who undertook immediate investigation and transferred plaintiff to another department with no loss of pay or benefits, all within one week of plaintiff's initial complaint, took proper remedial action and was thus not liable under Title VII); see also Garcia v. Elf Atachem North America, 28 F.3d 446, 451 (5th Cir. 1994) (employer was not liable under Title VII because he immediately reprimanded the harasser, gave stern warning, and effectively ended any further harassment); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 310 (5th Cir. 1987); cf. Cortes v. Maxus Exploration Company, 977 F.2d 195, 199 (5th Cir. 1992) (employer did not take any remedial measures to protect the plaintiff); Waltman v. International Paper Co., 875 F.2d 468, 481 (5th Cir. 1989) ( reversal of summary judgment where there was some question whether the employer's remedial action, namely, requiring the supervisors to read its sexual harassment policy to their crews, was sufficient).

**b. Sims' arguments**

Sims remonstrates with two different arguments. First, Sims apparently asserts that the prompt remedial action element is inapplicable; she argues that the cases cited by Brown & Root are distinguishable on the grounds that the present case involves a supervisor, rather than a co-worker, who controlled the plaintiff's terms and conditions of employment. The necessary implication flowing from this argument, which the court will initially dispel, is that Brown & Root is strictly liable for the acts of its supervisors. Second, Sims claims that a hostile work environment existed, even before the incidents between Brossette and Sims, which was so pervasive that Brown & Root either knew or should have known about it and taken measures earlier.

**c. Title VII is not a strict liability statute**

Sims' first argument, although drawing a somewhat interesting distinction upon first glance, is, upon closer examination, dubious at best, and severely misleading to the court at worst. In Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986), the Supreme Court left open the question of when an employer is liable for sexual harassment due to the acts of its employee. It made clear, however, that two distinct caveats were to be followed by the lower courts: (1) there are some limits on the acts of employees for which employers will be held responsible under Title VII and thus employers are not

always automatically liable for acts of their supervisors; and (2) absence of notice to an employer does not necessarily insulate that employer from liability. Id. at 72, 106 S.Ct. at 2408.

Fifth Circuit jurisprudence is consistent with the Supreme Court's cautionary instruction. That is, employers may be held liable for the acts of their agents. See Grant v. Lone Star Co., 21 F.3d 649 (5th Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 574 (1994); see also 42 U.S.C. § 2000e (b). Employers may escape liability, however, if, upon learning of the illicit behavior of the agent, prompt remedial action is taken. Carmon, 17 F.3d at 795; Nash, 9 F.3d at 404-405. Furthermore, it is the plaintiff's burden to prove that the employer failed to take prompt remedial action after notice. Id.

Sims misapprehends the nature of this analysis to be that an employer is always liable for the acts of its agents, when, in fact, it is correct to state that agency theory is only a mechanism--showing employer knowledge--which opens the door to employer liability. This door will quickly shut if the plaintiff can not prove that the employer also failed to take prompt remedial action. This conclusion is based upon a common sense interpretation of the Fifth Circuit's recitation of the fifth element of a sexual harassment claim:

> [T]he employer knew or should have known of the harassment in question **and** failed to take prompt remedial action.

Jones, 793 F.2d at 719-720 (emphasis added). Thus, the conjunctive "and" makes certain that even if Sims is

able to prove employer knowledge, such as the knowledge of Brown & Root through its agents, it must also prove that Brown & Root failed to take prompt remedial action.

**d. Prompt remedial action element is applicable**

Reviewing Sims' argument, she cites the following language from Nash in support of her argument that the prompt remedial action element is inapplicable when a supervisor, as opposed to a co-worker, sexually harasses an employee:

> As the offender in [the Supreme Court case of] Harris [v. Forklift Systems, Inc.] was the company president, the issue of respondeat superior liability never arose. This case poses a more typical situation, in which the alleged offender, though in some ways a direct supervisor of Nash's work, was not responsible for the terms and conditions of her employment, for her work assignment within the company, or for hiring or firing decisions. The summary judgment record does not establish that anyone within the company hierarchy was aware of Nash's complaints against Sharp until she went to the personnel department on February 22, 1991. The record also contains no evidence that Sharp's conduct took place in public, under the eye of co-workers or supervisors. It thus appears that the

> company did not know nor should it have known of Sharp's offensive inquisitiveness about Nash until she complained to those with authority to address the problem.

Nash, 9 F.3d at 404. Sims' interpretation of this language is

> that the Court drew an implicit distinction here between those supervisors who have no control over the terms and conditions of employment (i.e., those who can hire, fire or give pay raises, etc.) and those supervisors like BROSSETTE who do have control over the victim's terms and conditions of employment.

Sims' Mem. Oppos. Summ. J., at 21-22.

In other words, Sims is arguing that in the circumstance that a supervisor is the harasser, the prompt remedial action element does not apply and the employer is thus strictly liable. Nash does not say so much as Sims would have the court believe. In fact, the court in Nash noted, immediately preceding the language cited by Sims, that:

> Harris does not, however, support the proposition that in all such cases, an employer will be held liable for a violation of Title VII. An employer becomes liable for sexual harassment

only if it knew or should have known of the harassment and failed to take prompt remedial action.

Nash, 9 F.3d at 404. Thus, the Fifth Circuit has taken the position that Title VII is not a strict liability statute. Moreover, the jurisprudence shows that the prompt remedial action element has been applied even when supervisors were the alleged harassers. See Garcia, 28 F.3d at 448 (plant foreman was the alleged harasser); Cortes, 977 F.2d at 197 (immediate supervisor was the alleged harasser); Waltman, 875 F.2d at 479 (supervisor was the alleged harasser); Jones, 793 F.2d at 716 (Vice-President in charge of Personnel was the alleged harasser); Fisher v. Farley, 1994 WL90325 n.32 (E.D. La. 1994) (immediate supervisor was the alleged harasser; the court found that supervisors are subject to the respondeat superior element); Cuesta v. Texas Department of Criminal Justice, 805 F.Supp. 451, 453 (W.D. Texas) (Regional Supervisor was the alleged harasser); but see Ross v. Double Diamond, Inc., 672 F.Supp. 261, 274 (N.D. Texas 1987) (sexual harassment committed by a supervisor was imputed to the employer under strict liability theory). Once again, this is consistent with the Supreme Court's teachings in Meritor Savings Bank, FSB, which, it must be remembered, cautioned that employers are not "always automatically liable for sexual harassment by their supervisors." Meritor Savings Bank, FSB, 477 U.S. at 72, 106 S.Ct. at 2408.

**e. Sims' counsel has misled the court**

Next, it appears that Sim's counsel deceptively attempted to mislead the court into believing that the Supreme Court has set forth a strict liability standard in cases where the supervisor is the harasser. To wit, in her brief Sims quotes the following language from Meritor Savings Bank, FSB as authoritative:

> [W]here a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them.

Sims' Mem. Oppos. Summ. J., at 17 (quoting Meritor Savings Bank, FSB, 477 U. S. at 70, 106 S.Ct. at 2407). Incredibly, the quoted language is not the view taken by the Supreme Court, but merely a statement of the position taken by one of the litigants--which, importantly, was not adopted by the Supreme Court, but was, in fact, rejected. Meritor Savings Bank, FSB, 477 U. S. at 70-72, 106 S.Ct. at 2407-2408 ("we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors"). The court, try as it might, is unable to comprehend how this could have been inadvertently inserted by plaintiff's counsel--absent extreme neglect--in light of the fact that the sentence and paragraph began with obvious references to the EEOC's amicus curiae brief. The court would

admonish plaintiff's counsel at this point, but unfortunately the story is not quite at its end.

Additionally, Sims cites and quotes Vinson v. Taylor, 753 F.2d 141 (D. C. Cir. 1985), aff'd sub nom, Meritor Savings Bank, FSB, 477 U. S. 57, 106 S.Ct. 2399 (1986), for the proposition that "if the creator of the hostile work environment is a supervisor, then the employer need not receive any notice." Sims' Mem. Oppos. Summ. J., at 18. Although Vinson was affirmed by the Supreme Court in Meritor Savings Bank, FSB, the Court, as discussed above, explicitly rejected the very same notion. Meritor Savings Bank, FSB, 477 U. S. at 70-72, 106 S.Ct. at 2407-08.

Finally, a group of Fifth Circuit cases dealing with Title VII racial discrimination were cited by Sims in support of her strict liability argument. Sims' Mem. Oppos. Summ. J., at 2 n.1. This was the wrong line of cases to cite in litigation involving sexual harassment, which has itself an entire large body of jurisprudence.[4]

**f. Application of law to facts**

Having decided that the prompt remedial action element is applicable, the court must next determine

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[4] The court also notes with irritation that plaintiff's counsel even failed to announce the proper summary judgment standard. Instead of referring mostly to the Supreme Court's trilogy of cases dealing with this subject, many older cases, some not even within this Circuit, were cited as authoritative. See Sims' Mem. Oppos. Summ. J., at 3-6.

whether a genuine issue of material fact has been presented. Upon receiving notice of Sims' complaint in late February of 1993, the Human Resources Department of Brown & Root moved with commendable rapidity. On the day of Sims' complaint, Greg Conklin phoned Sims from his office in Houston. He listened to her allegations, assured her that he would thoroughly investigate her claims, that she would be paid back for any lost wages if her claims were true, and that she should let him know if anything further happened between her and Brossette. The following week another Human Resources representative, Ralph Morales, visited the jobsite to investigate Sims' claims. Morales interviewed Sims, Brossette, and other Brown & Root employees. When Morales spoke with Sims, he told her to let him know if anything further occurred during the pendency of the investigation.

During the investigation, Brossette requested that Sims perform a job task; Sims reported this to her immediate supervisors, Judy Ladner and Tracy Hood. Hood told Brossette that he was not to be alone with Sims and that Brossette should go through Hood if he needed any tasks done. Sims had no further contact with Brossette.

On March 10, 1993, approximately two weeks subsequent to Sims' complaint and four or five days after the conclusion of Morales' investigation, Grossett was terminated for violation of Brown & Root's sexual harassment policy. Sims was then restored to the position she had occupied previously, making $10.00 per hour. She also received, in full, the back pay of which she had been deprived since her demotion to $8.00 per hour. Incidentally, for its actions, Brown &

Root subsequently defended against an unsuccessful defamation suit brought by Brossette.

Sims has been unable to direct the court to any evidence contradicting the fact that Brown & Root took the aforementioned actions upon receiving Sims' complaint to the Human Resources Department. Rather, it is clear that Brown & Root

> took the allegations seriously, it conducted prompt and thorough investigations, and it immediately implemented remedial and disciplinary measures based on the results of such investigation. Holding a company such as [Brown & Root] liable after it has taken such action would produce truly perverse incentives benefiting no one, least of all actual or potential victims of sexual harassment.

Carmon, 17 F.3d at 795-796. Moreover, it is apparent that Brown & Root's sexual harassment policy, which provides a clear avenue for all abused employees by way of its Open Door Complaint Policy and hotline telephone number, actually worked in this case and should therefore be praised and celebrated as a model of efficiency. Thus, in accordance with Nash and Carmon, Sims is apparently unable to make out a necessary element of her claim under Title VII.

**g. Lack of knowledge of Brossette's prior conduct**

The inquiry does not end here, however, because Sims argues that the prior acts of Brossette would tend to prove that Brown & Root knew or should have known of Brossette's behavior at a much earlier date and failed to take prompt remedial action at that point. Specifically, Sims alleges that at the UOP jobsite,[5] approximately one to two months before Sims was hired at the Olin jobsite and seven to eight months before Brossette was fired, Brossette acted similarly toward Lisa Acklin, Rose Coleman, and Judy Fife, female employees of Brown & Root. This group of acts is purportedly being offered not as character evidence, but to prove (1) that certain supervisors had notice of Brossette's behavior at this time; and (2) that Brossette's behavior was so pervasive that Brown & Root should have known about it. For the purpose of this Memorandum Ruling, the court will assume that this evidence is admissible under F.R.E. 404 (b).

Harry Vonsenden was the foreman of the pipe department at the UOP jobsite. He was sometimes able to hire, usually able to fire, and always able to

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[5] The UOP jobsite refers to a project in Blanchard, Louisiana that Brown & Root had undertaken prior to the subject matter of this suit. Brossette allegedly committed acts of sexual harassment at this prior jobsite, also. The claimed relevance of his prior acts is that Brown & Root knew or should have known of Brossette's behavior well before Sims' complaint and should therefore have taken remedial action much sooner.

discipline employees. In his deposition testimony, Vonsenden states that although he never spoke to Rose Coleman, Lisa Acklin, or Judy Fife directly concerning Brossette's conduct toward them, he had heard rumors from other employees that Brossette had hit on them or asked them out. Deposition of Harry Vonsenden, at p. 10-14 (February 24, 1995).

Howard Beatty was an electrical crew foreman at the UOP jobsite. He had the ability, albeit somewhat limited, to hire, fire, and discipline employees. Deposition of Howard Beatty, at p. 42 (February 24, 1995). In his deposition testimony, Beatty states that Lisa Acklin told him that Brossette had asked her on several occasions to go to be with him. Id. at p. 9. Also, Acklin said that Brossette told her it would be "worth her while." Id. at p.10. Finally, Beatty states that supervisory personnel, namely foremen, knew about Brossette's pattern of attempting to have sexual relations with female employees. Id. at p. 23.

Carol Vonsenden was an electrical helper at the UOP jobsite; she married Harry Vonsenden just before the UOP job ended. She was not a supervisor, but simply an employee. In her deposition, she states that Rose Coleman told her that Brossette had asked Coleman out "two or three times" and that Coleman "just always laughed about it." Deposition of Carol Vonsenden, at p. 9 (February 24, 1995). Also, Judy Fife told her that Brossette had asked Fife to a motel "more than once," but "it didn't seem to bother" Fife; rather, Fife would "always kind of laugh about it ... [m]ore like it was a joke ..." Id. at p. 12-13. Lisa Acklin, however, never mentioned Brossette's alleged behavior to Mrs. Vonsenden. She further states that she told Mr. Vonsenden this information. Id. at p. 13-14.

Judy Fife was an office cleaner at the UOP jobsite. She states that on three occasions Brossette indicated that she was a smart woman who could go far in the company if she slept with him. Deposition of Judy Fife, at p. 10-11 (February 24, 1995). On these occasions, Brossette asked her to go to a motel, dinner, or the movies. Id. at p. 12-13. She found some of this conduct to be "offensive." Id. She told Carol Vonsenden and an unidentified tool room supervisor about these incidents. Id. at p. 11.

Although the court obviously does not condone the alleged actions of Brossette, it concludes as a matter of law that Brown & Root did not have knowledge of his conduct. The only supervisors who had heard "rumors" of Brossette's conduct were Harry Vonsenden, a low-level tool foreman, and Howard Beatty, a low-level electrical crew foreman. There is a notable absence of evidence, however, that a higher level supervisor or immediate supervisor had knowledge of Brossette's alleged conduct. Thus, the court will not impute Vonsenden or Beatty's knowledge of what each describes as "rumors" to Brown & Root.

As for Brossette's knowledge of his own conduct, it is possible that this could provide notice to Brown & Root through agency principles. The effect of this decision, however, would result in employers being held strictly liable in many typical situations; and the Fifth Circuit, as discussed above, has made clear that Title VII is not a strict liability statute. Nash, 9 F.3d at 404. For example, if a victim does not report harassment at all-as was the case with the women at the UOP jobsite--or waits for a lengthy period of time before reporting, the employer will never have an

opportunity to engage in prompt remedial action and will thus be liable.

This would result not only in de facto strict liability for employers, but would encourage both the victim and the supervisor to be silent. That is, the victim's silence would be beneficial to her Title VII claim because it would severely limit the employer's opportunity to take prompt remedial action. Of course, the supervisor who engages in illicit conduct is unlikely to report himself. This would, in turn, curtail the use of sexual harassment policies to aid thoughtful employees in rectifying the situation. Thus, the court will not impute Brossette's knowledge of his own alleged conduct to Brown & Root.

The discussion above concerned whether Brown & Root had actual knowledge of Brossette's prior conduct; The focus now shifts to whether Brown & Root had constructive knowledge. For Sims to prove that Brown & Root had constructive knowledge, she must show that a hostile work environment existed which was so pervasive that Brown & Root should have known about it. Waltman, 875 F.2d at 478; Cuesta, 805 F.Supp. at 455. No reasonable juror could find in favor of Sims on this issue. With the exception of one of Brossette's exchanges with Judy Fife, none of the alleged conduct nearly rises to the level of sexual harassment. Much of the evidence consists of Brossette asking female employees out on dates, albeit in a forward manner. Furthermore, no evidence has been presented that Rose Coleman or Lisa Acklin were in the slightest bit offended by Brossette's conduct. In fact, at least Coleman laughed about Brossette's conduct; also, although there is contradictory evidence, Fife also thought Brossette's conduct was

laughable, "like it was a joke." Although Fife testifies that she was at least somewhat offended, this is simply insufficient for one to draw the conclusion that sexual harassment was so pervasive in the workplace that Brown & Root should have known about it.

**3. Conclusion**

When an employee complains that she has been sexually harassed, the employer must sail safely between Scylla and Charybdis as it faces the unenviable task of taking appropriate, lawful action toward both the alleged victim and the alleged wrongdoer. Indeed, Brown & Root's course has been perilous: Brossette brought a defamation suit against it subsequent to his termination and, obviously, Sims has brought suit in the present case. Nevertheless, Brown & Root acted as a responsible, exemplary employer by processing Sims' complaint swiftly, seriously, and, upon gathering the evidence in a thorough manner, decisively and justly. Sims was place back in her original position, given lost back pay, and Brossette was terminated. Thus, the court has no difficulty concluding that Sims has failed to prove an essential element of her claim, that Brown & Root failed to take prompt remedial action upon receiving notice of Brossette's conduct.

Furthermore, the court holds that Sims has failed to raise a genuine issue of material fact whether Brown & Root had knowledge of Brossette's prior conduct at the UOP jobsite and failed to take prompt remedial action at that point. Therefore, Sims' Title VII claims are dismissed.

**B. Constructive Discharge**

To prevail on her constructive discharge claim, Sims must prove that "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Borque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980); see also Cortes, 977 F.2d at 200; Landgraf v. USI Film Products, 968 F.2d 427, 430 (5th Cir. 1992), aff'd, ___ U. S. ___, 113 S.Ct. 1250 (1993). Furthermore, she must "demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment." Landgraf, 968 F.2d at 430.

The evidence, and lack thereof, compels the court to rule against Sims on this issue. Sims resigned on May 19, 1994, seventy days after Brown & Root terminated Brossette. Greg Conklin and Ralph Morales both made certain that Sims knew she should contact them if she had any further problems. Yet, Sims never complained. Sims admits that she had other employment lined up at the time of her resignation; there is evidence that this is the reason she left. Finally, and most importantly, Sims is unable to present any credible evidence that conditions were so intolerable that she was forced to resign. Rather, she can only state that she felt "awkward" due to the "attitude" of two Brown & Root employees--who are also Brossette's relatives--toward her following Brossette's termination. Therefore, the court concludes that Sims has presented insufficient evidence to create a genuine issue of material fact. See Ugalde v. W. A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993) (no genuine issue of material fact created where the only evidence of

discriminatory conduct was that the supervisor referred to Hispanic workers as "wetbacks" and "Mexicans").

**C. State Law Tort Claims**

Sims claims that Brossette committed the intentional torts of battery and intentional infliction of emotional distress. As pointed out by Brossette and Brown & Root in their briefs, however, these claims have prescribed. La. Civ. Code art. 3492 provides in pertinent part:

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained.

The present suit was filed on April 15, 1994. All of the acts Brossette allegedly committed toward Sims occurred during Brossette's employment with Brown & Root. Brossette was terminated on March 10, 1993, more than a year prior to the filing of Sims' suit.

In response to the defendants' motions for summary judgment on the prescription issue, Sims manages only this comment:

> Since the damage caused by BROSSETTE did not cease after his discharge, then SIMS ought to be allowed a tolling of the prescriptive period until the date she left her employment which would be within the one year period.

Rec. Doc. 62, at p. 2 (citing Waltman, 875 F.2d at 476). Sims once again misstates the law. As pointed out by the Fifth Circuit in Waltman itself:

> The Louisiana Supreme Court has recognized an equitable exception to [the] prescription period, holding that "when the tortious conduct and resulting damages continue, prescription does not begin until the conduct causing the damage is abated ... Where the cause of the injury is a continuous one giving rise to successive damages, prescription dates from the cessation of the wrongful conduct causing the damage."

Waltman, 875 F.2d at 476 (quoting South Central Bell Telephone v. Texaco, Inc., 418 So.2d 531, 533 (La. 1982)) (emphasis added). Thus, courts should look to the date the conduct abates, and not, as Sims suggests, to the date the damage abates.

As mentioned above, Sims has failed to present any evidence that Brossette engaged in any tortious conduct following his termination from Brown & Root. Therefore, the state law claims asserted by Sims against Brossette and Brown & Root as his employer are dismissed. Accordingly, Brossette's third party complaint against State Farm is also dismissed.

An order consistent with the terms of this Memorandum Ruling was previously issued on April 10, 1995. Rec. Doc. 68.

**THUS DONE AND SIGNED** at Shreveport, Louisiana, this 10th day of June , 1995.

s/ Tom Stagg
Judge Tom Stagg

COPY SENT
DATE 06/12/95
BY Loja
TO Cameron
Barker
Jordan
Townsend
Lattier